cessive or in any manner wrongfully collected. . . . The cause of action would seem to have ripened when any sum has been wrongfully collected. Its maintenance is deferred until the prescribed conditions are met."

This decision reads the statute as a whole and gives effect to the whole.

4.

Throughout the course of this suit the government, the District Court and the Circuit Court have stressed the reports of the congressional committees considering the bill that led to the establishment of the Board of Tax Appeals, now Tax Court. Great importance has been placed upon the fact that Congress, as shown by these committee reports, considered that a provision for appeal from the Commissioner's decision prior to the payment of the tax was necessary to remove an existing hardship. It was said that the right of appeal after payment of the tax was an incomplete remedy and that the taxpayer was entitled to an appeal and determination of his tax liability prior to payment. (See H. Rep. No. 179, 68th Cong. 1st Sess. pp. 7-8 (1939), 1 Cum. Bull. (Part 2) 241, 246-247.) The government and lower courts have taken this action as being a legislative construction that no right existed to pay part of the tax and then sue.

We see nothing in this report that requires the conclusion that Congress, speaking through its regularly constituted committees, considered that it was only after payment of the *whole* tax that a suit could be instituted. It

must be fairly obvious that in the ordinary case the taxpayer would prefer to pay the entire tax. Such payment could be dictated by several consideration, including the cutting off of interest, but the most important one is that under the law as it existed prior to 1924 the Commissioner had full power at any time after making the assessment to enforce collection of the tax by summary proceedings. This would be an objectionable method to any taxpayer so anyone who was in financial position to do so would prefer to make his own arrangements for the raising of the cash necessary to make the payment. But those considerations would apply without reference to the question as to whether suit could be filed for part of the tax. If anyone of financial means sought to obtain a declaration of tax liability by payment of part of the tax and suit to recover, the Commissioner would not be long in bringing about the collection of the balance of the tax. Therefore, in either event the hardship existed.

The Congress, therefore, in recognizing the existence of a hardship because of the lack of appeal prior to collection of the tax, was merely considering the practical situation and seeking to relieve the hardship resulting in the ordinary case. There is nothing in that action constituting a legislative construction of the statute as contended for by the government in this case.

CONCLUSION

The statute conferring jurisdiction appears plain. It allows suit in the District Court or the Court of Claims to recover "any internal revenue tax alleged to have been erroneously or illegally assessed or collected." It allows such suit to recover "any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws." We see no reason to construe this grant of jurisdiction with an adverse eye. The majority of the court in the *Bushmiaer* case considered it "positive, plain and unambiguous." We see no reason for this Court to differ from that interpretation and for these reasons submit that this petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 5502 — May Term, 1957.

Walter W. Flora, Appellant, vs. United States of America, Appellee.	Appeal from the United States District Court for the District of Wyoming.

[Filed July 1, 1957.]

A. G. McClintock for Appellant.

John N. Stull (Charles K. Rice, Assistant Attorney General, A. F. Prescott and David O. Walter, Attorneys, Department of Justice, and John F. Raper, Jr., United States Attorney, were with him on the brief) for Appellee.

Before PHILLIPS, PICKETT and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

By complaint filed in the United States District Court for the District of Wyoming, plaintiff Flora[1] sought recovery of the sum of $5,058.54 paid to the government in partial satisfaction of a deficiency personal income tax assessment for the year 1950 in the amount of $27,251.13.

[1]Hereinafter called the taxpayer.

INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and constitutional provisions involved	2
Statement	3
Reasons relied on for allowance of writ	4
Conclusion	13
Appendix	14

CASES CITED

Blair v. Birkenstock, 271 U. S. 348	7
Bushmiaer v. United States, 230 F. 2d 146 (C.A. 8)	5, 13
Cheatham v. United States, 92 U. S. 85	6
Coates v. Commissioner, 111 F. 2d 609 (C.A. 2)	5
Dobson v. Commissioner, 320 U. S. 489	7
Dodge v. Osborn, 240 U. S. 118	6, 7
Graham v. DuPont, 262 U. S. 234	7
Hanchett v. Shaughnessy, 126 F. Supp. 769 (D.C.N. D.N.Y.)	10
Phillips v. Commissioner, 283 U. S. 589	7, 8
Savings Institution v. Blair, 116 U. S. 200	6
Suhr v. United States, 18 F. 2d 81 (C.A. 3)	7
U. S. v. Emery Bird, Thayer Realty Co., 237 U. S. 28	10
U. S. v. Jefferson Electric Co., 291 U. S. 386	7
U. S. v. Shaw, 309 U. S. 495	10

Taxpayer alleged the deficiency to be erroneously assessed and the payment to be illegally collected because of a determination by the Commissioner of Internal Revenue that certain losses occurring to the taxpayer during the tax period and reported by him as ordinary losses were properly capital losses within the meaning of that term as defined by sec. 117(a)(1) of the Internal Revenue Code of 1939.

Jurisdiction is alleged to exist under the provisions of 28 U.S.C.A. 1346.[2] Responding to the complaint, the government alleged that the action could not be maintained in the District Court because the entire amount of the assessment had not been paid and, without waiving this special defense, counterclaimed for the unpaid balance. The District Court denied the special defense[3] but entered judgment upon the merits for the government on its counterclaim.

We are of the opinion that determination of a single question is dispositive of the case: Can a taxpayer maintain a personal income tax refund suit in the District Court without first paying the entire amount of the tax assessed for the period in question?

---

[2] Section 1346 provides, in part:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: (1) (As amended by Sec. 1, Act of July 30, 1954, c. 648, 68 Stat. 589) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or, in any manner wrongfully collected under the internal-revenue laws *, * *."

[3] 142 F. Supp. 602. The trial judge, although indicating he thought the defense meritorious, deemed it better practice to reserve the question for this court in view of what he considered a conflict between the circuits. See Suhr v. U.S., (3 Cir.) 18 F. 2d 81; Bushmiaer v. U.S. (8 Cir.) 230 F. 2d 146.

Beginning with the comments of Mr. Justice Miller in Cheatham v. United States, 92 U.S. 85, 23 L. Ed. 561, and continuing through many decision,[4] the Supreme Court has consistently indicated that full payment of a tax deficiency is a prerequisite to a judicial claim for refund. And such has been the established policy of our tax system.[5]

In 1924, Congress, recognizing both the desirability of maintaining a minimum of judicial interference with the collection of taxes and the concomitant hardship imposed on taxpayers by an inflexible "pay first, litigate later" rule, established the Board of Tax Appeals (now the United States Tax Court) as a place where the validity of a tax assessment could be initially questioned. In creating the Board of Tax Appeals the House Committee on Ways and Means stated:

> "(H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7-8 (1939) 1 Cum. Bull. (Part 2) 241, 246-247):
>
> "The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, *after payment of his tax*, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he cannot, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes,

[4] Savings Institution v. Blair, 116 U.S. 200, 6 S. Ct. 353, 29 L. Ed. 657; Dodge v. Osborn, 240 U.S. 118, 36 S. Ct. 275, 60 L. Ed. 557; Graham v. Dupont, 262 U.S. 234, 43 S. Ct. 567, 67 L. Ed. 965; Phillips v. Commissioner, 283 U.S. 589, 51 S. Ct. 608, 75 L. Ed. 1289; United States v. Jefferson Electric Co., 291 U.S. 386, 54 S. Ct. 443, 78 L. Ed. 859; Dobson v. Commissioner, 320 U. S. 489, 64 S. Ct. 239, 88 L. Ed. 248.

[5] For a discussion of the historical development of this policy see the opinion of Woodrough, Circuit Judge, dissenting in Bushmiaer v. United States, supra.

INDEX (Continued)

PAGE

STATUTES

28 U. S. C. sec. 1346 2

Internal Revenue Code of 1954:

Sec. 7422(a) 2

Sec. 7485 9

MISCELLANEOUS

H. Rep. No. 179, 68th Cong. 1st Sess. pp. 7-8 (1939) 1 Cum. Bull. (Part 2) 241, 246-247 11

secure such a determination prior to the payment of the tax. The right to appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. The results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment." (Emphasis supplied.)

Since the establishment of the tax court the distinctive purpose of its creation has been judicially recognized and its intended powers guarded. In Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 721, 49 S. Ct. 499, 73 L. Ed. 918, the Supreme Court stated:

"The Board of Tax Appeals, established by sec. 900 of the Revenue Act of 1924, Tit. IX, c. 234, 43 Stat. 253, 336, was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue's determination of additional income and estate taxes by the Board in advance of their paying the tax found by the Commissioner to be due. Before the Act of 1924 the taxpayer could only contest the Commissioner's determination of the amount of tax after its payment."

And in Dobson v. Commissioner, supra, the court stated:

"Congress has invested the tax court with primary

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. .....

WALTER W. FLORA, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cause on July 1, 1957.

Opinions Below

The opinion of the Court of Appeals is not yet reported in the Federal Reporter. It is reprinted as part of the appendix. The opinion of the district court is reported in 142 F. Supp. 602 and is also set forth in the record, pages 12 to 18.

authority for redetermining deficiencies, which constitutes the greater part of the tax litigation. This requires it to consider both law and facts. Whatever latitude exists in resolving questions such as those of proper accounting, treating a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences, exists in the tax court and not in the regular courts."

In view of such consistent statements of the Supreme Court and the actual wording of sec. 7422 of the Internal Revenue Code of 1954[6] we are not impressed with the argument that the instant suit is but a claim for refund for an amount of tax actually paid and does not include a review of the total assessment or the remaining deficiency not paid. Such approach is unrealistic and serves only to conveniently defeat the established purpose and function of the tax court.

Taxpayer's complaint wherein it affirmatively appeared that only a partial payment upon a deficiency assessment had been made failed to state a claim. The government, apparently content with the deficiency assessment, does not contend that its judgment upon counterclaim should be sustained independently.

The cause is remanded to the District Court with directions to vacate the judgment of the government upon its counterclaim and to dismiss the action without prejudice.

---

[6] "Civil Actions for Refund.

(a) No Suit Prior to Filing Claim for Refund.

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, * * *"

Jurisdiction

The judgment sought to be reviewed was rendered and entered on July 1, 1957. No petition for rehearing has been filed nor has the petitioner applied for an order extending the time within which to petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

Question Presented

Whether the United States District Court has jurisdiction of a tax refund suit when the taxpayer has not paid his entire income tax for the taxable year involved.

Statutes and Constitutional Provisions Involved

28 U.S.C. sec. 1346 (as amended by Sec. 1 of Act of July 30, 1954, c. 648, 68 Stat. 589), insofar as pertinent, provides as follows:

"Sec. 1346. *United States as defendant.*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws; * * *"

Section 7422(a) of the Internal Revenue Code of 1954, (Act of August 16, 1954, c. 736, 68A Stat. 876), provides in part that:

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax

alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the secretary or his delegate. * * *"

Statement

Petitioner suffered losses in transactions involving the purchase and sale of commodities and commodity futures during the year 1950. These losses were reported as ordinary losses but this was disallowed by the Internal Revenue Service, resulting in an addition to the income of petitioner of $42,608.05 and additional tax, plus interest, in the amount of $28,908.60. A later assessment was made of a penalty of $45, plus interest. Petitioner paid a total of $5,058.54 on these assessments and filed a claim for refund. Upon its disallowance this suit followed. (R. 20-21) The United States counterclaimed for the balance of the deficiency. (R. 9-10)

The United States included in its answer a defense that the court was without jurisdiction of the cause since petitioner had not paid the entire amount of income taxes for 1950. This defense was heard separately prior to trial and overruled. (R. 11) In its opinion of July 24, 1956, the court reviewed this question (R. 13-15) and stated that the petitioner should not maintain the suit since he had not paid the entire tax assessment. (R. 15) However, in view of what the court considered a conflict between decisions of the Third and Eighth Circuits and since the Court of Appeals for the Tenth Circuit had not passed on the question, it considered the merits of the case. Findings and conclusions were entered in favor of the United States upon both the complaint and counter-

claim (R. 18-21) and judgment was entered against the taxpayer and in favor of the United States on its counterclaim. (R. 21-22)

Jurisdiction of the United States District Court in the first instance is predicated upon section 1346 of 28 U.S.C., and it is contended that the suit is one to recover an internal revenue tax erroneously and illegally assessed and collected, or a sum of money which was wrongfully collected under the internal revenue laws. The Court of Appeals rejected this contention and held that the District Court was without jurisdiction and remanded the cause with directions to vacate the judgment for the government upon its counterclaim and to dismiss the action without prejudice.

Reasons Relied on for Allowance of Writ

The decision of the court below denies to the taxpayer the right to resort to the District Court of his residence for redress for income tax assessments claimed to have been erroneously or illegally assessed and collected unless the taxpayer can pay and has paid the full amount of the tax assessed. While the principle of immunity is not denied, where that immunity has been waived the amenability of the sovereign to suit in courts readily available to the citizen is of the utmost importance and if this right is to be denied it should only be because of the clear lack of statutory authority. The decision below should therefore be reviewed because it presents a jurisdictional question of general importance and is clearly in conflict with the decisions of other courts of appeal.

1.

The decision sought to be reviewed is in direct conflict with the recent decision of the Court of Appeals for the Eighth Circuit in *Buslimiaer v. United States*, 230 F. 2d 146. In that case, exactly as in this, the taxpayer had paid a part only of the deficiency assessment against him, then filed claim for refund of the amount so paid and upon its rejection filed suit in the District Court for the amount so paid. The District Court dismissed the suit for want of jurisdiction. The Court of Appeals reversed, one judge dissenting, saying:

> (p. 149). "In view of the positive, plain and unambiguous provisions of the Tucker Act as amended in 1954 we cannot escape the conviction that the District Court had jurisdiction of the present action. * * *
>
> "* * * In the final analysis the ultimate question requiring determination in the instant case is whether plaintiffs regardless of how exhorbitant, unjust or illegal the additional assessment might be are required to pay the full amount of such assessment as a condition precedent to the right to invoke the jurisdiction of the District Court in an action to recover a refund. * * * *"

The decision is also in conflict with the plain language of the decision of the Court of Appeals of the Second Circuit in the case of *Coates v. United States*, 111 F. 2d 609. In that case plaintiff started his action without payment of the full tax but prior to its determination had paid the full amount. The government urged lack of jurisdiction because the full amount had not bee paid when the suit was brought.

Perhaps it was not necessary for the Court of Appeals to dispose of it on the ground it did but notwithstanding

the payment of the full tax the government was still asserting lack of jurisdiction. The court said:

> (p. 610) "It is pressing technicality beyond all bounds to say that a taxpayer who has made a return on an excessive basis and has paid installments which are more than the correct amount of tax before discovering his error, must pay the remaining installments indicated by the incorrect return on pain of losing his remedy to recover overpayment. The proposition has neither reason nor authority in its favor. We reject the jurisdictional point and pass on to the merits."

2.

The decision of the court below improperly construes previous decisions of this Court. On page 2 of the opinion we find this statement:

> "Beginning with the comments of Mr. Justice Miller in *Cheatham v. United States*, 92 U. S. 85, 23 L. Ed. 561, and continuing through many decisions, the Supreme Court has consistently indicated that *full* payment of a tax deficiency is a prerequisite to a judicial claim for refund. And such has been the established policy of our tax system." (Emphasis added)

It is respectfully submitted that at no time has this Court had before it for consideration the question as to whether the full tax as assessed must be paid. In the *Cheatham* case the full tax had been paid and the question before the court was only as to the time when limitations began to run against the maintenance of the suit to recover. Of the other cases cited by the court below, *Savings Institution v. Blair*, 116 U. S. 200, held that suit to recover could not be brought unless claim therefor had been filed within time fixed by law and *Dodge v. Osborn*,

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BRIEF FOR WALTER W. FLORA, PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 492

WALTER W. FLORA, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT

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Counsel for Petitioner.

240 U. S. 118, and *Graham v. DuPont*, 262 U. S. 234, held that injunction against collection of the tax would not lie. *United States v. Jefferson Electric Co.*, 291 U. S. 386, was a suit to recover and there was no question but that the full amount had been paid. *Dobson v. Commissioner*, 320 U. S. 489, had come up through the Tax Court so no question of the amount of payment was involved.

Phillips v. Commissioner, 283 U. S. 589, points out that two methods are available to the taxpayer in only one of which, appeal to the Tax Court, may the taxpayer avoid summary proceedings to collect the tax and even in such case the Commissioner may make jeopardy assessment and collect by distraint unless the taxpayer filed a bond. Of the tax payment method the court says:

> "He may contest his liability by bringing an action, either against the United States or the Collector to recover the *amount* paid." (Emphasis added)

This case is also interesting in pointing out in a note, p. 596, that by the establishment of the Tax Court, "the paramount right of the United States to require immediate payment, or surety therefor, is not diminished."

The case of *Suhr v. United States*, 18 F. 2d 81 (CA 3), was considered by the District Judge to be in conflict with the *Bushmiaer* case. In that case we find the following statement:

> "None of the various tax acts provide for recourse to the courts by a taxpayer until he has failed to get relief from the proper administrative body or has paid all the taxes assessed against him. The payment of a part does not confer jurisdiction upon the courts. *Blair v. Birkenstock*, supra."

Blair v. Birkenstock, 271 U. S. 348, cited as authority

for the proposition stated, does not sustain the point. The only question in the case was the date from which and to which interest should be allowed.

3.

Both Congressional enactments and decisions of this Court express the doctrine that injunction against the collection of a tax will not be permitted nor may the taxpayer secure a declaratory judgment as to his liability to pay a deficiency assessment. Implicit in the decision of the court below is a strong feeling that the maintenance of a suit of this kind, without full payment of the tax, is a method of obtaining a judicial determination of the liability without having made payment and therefore an evasion of the rule that courts will not interfere with the collection of taxes in the first instance. The court is of the view that contest before payment can be allowed only by strict adherence to the procedure permitting appeal to the Tax Court.

As has been held by this Court, *Phillips v. Commissioner*, supra, the only way in which the taxpayer can avoid summary proceedings to collect the tax assessed against him, however, illegal it may be, is by appeal to the Tax Court. The deficiency assessment in this case was made March 10, 1952, and the right of appeal to the Tax Court expired 90 days thereafter. The two payments made by petitioner were in March and June of 1953 and suit to recover was filed August 3, 1956. (R. 3-4) When petitioner failed to take appeal from the Commissioner's decision he subjected himself to summary proceedings to collect the deficiency. This situation has continued since June of 1952.

It is apparent therefore that not one thing the taxpayer has done in this case has operated to thwart the government in the admittedly important function of tax

collection. Unless it might be his lacking funds or property with which to pay the tax, the taxpayer has done nothing in any way seeking to limit the right of the government to enforce its tax claim. The filing of this suit could not so operate and if during the pendency thereof the government sought to enforce its collection rights in a summary way, no legal remedy could have issued from the District Court restraining or interfering with that collection.

On the other hand, if petitioner in this case is without remedy by suit to recover the part of the tax that he has paid, there exists a field where the taxpayer is denied access to the regularly constituted courts of general jurisdiction. A taxpayer without funds to pay the entire tax and without the financial standing to procure a bond might take an appeal to the Tax Court without paying the tax (subject always to possible jeopardy assessment) but his right to appeal to the Court of Appeals to secure a review of the assessment is subject to posting a bond. Sec. 7485. Int. Rev. Code 1954, 26 U.S.C.A. sec. 7485. The financially hard pressed taxpayer is therefore effectively denied a complete remedy permitted a taxpayer in good financial condition. Moreover, a taxpayer who has not discovered the possible illegality or error of the imposed deficiency until he has made some payment or after time for appeal to the Tax Court has expired and who does not have the funds with which to pay the whole tax will find himself completely without redress and without the means of recovering the amount illegally exacted from him.

It is not intended by this discussion to inject any issue of lack of due process in the assessment of the tax. But if there is one construction of the statute that permits the government to collect its taxes without interference and at the same time preserves a complete right to litigate